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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 314

JOSEPH ROTONDO,

Petitioner,

against

ISTHMIAN STEAMSHIP CO., INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE HONORABLE: THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on the 2nd day of May, 1957.

Opinions Below

No opinion was rendered herein in the District Court.

The opinion of the United States Court of Appeals is reported at 243 F. 2d 581. A copy of the opinion is printed in the Appendix, hereto annexed.

Jurisdiction

The judgment of the United States Court of Appeals was dated and entered on May 2, 1957. The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254 (1).

Questions Presented

(1) Where, in an action brought by the petitioner (a longshoreman injured upon defendant's vessel through alleged negligence on the part of defendant) wherein the sole evidence with respect to liability was that offered on plaintiff's behalf, and wherein after the jury had rendered a verdict in favor of the defendant, it appeared from statements of five or more of the jurors made immediately thereafter to plaintiff's counsel that the verdict was arrived at in disregard of the evidence and in disregard of the Court's instructions, and was based *upon extraneous matter* improperly introduced into their deliberations—whether the action of the Trial Judge was proper, when (upon the aforesaid jurors' statements having been brought to his attention) he refused to make, or to permit to be made, any inquiry into the truth or falsity of the said statements, in order to ascertain whether the verdict should be permitted to stand; and whether the Court of Appeals, in affirming the judgment and orders appealed from, acted (in view of the aforesaid circumstances disclosed herein) under a serious misapprehension of the applicable law.

(2) Whether the reference, volunteered by the Trial Judge (when asked by a juror if the plaintiff, in case they could not agree for him, had "any other avenue open to him") to the Workmen's Compensation Law of the State of New York (as a further or alternative mode of redress whereby he might be compensated for his injuries) constituted reversible error.

Statement of the Case

The facts, according to the uncontroverted testimony on petitioner's behalf, include the following:

The plaintiff, Joseph Rotondo (petitioner herein) at the time of the accident on May 24, 1953, was a long-

shoreman then working as the header or boss of a gang of men in the hold of the steamship "Steel Apprentice", which was docked at the Breakwater Pier, at the Erie Basin in Brooklyn; on May 24, 1953, which was Sunday, plaintiff had worked all that day at the No. 3 hatch from eight o'clock in the morning until about 8:30 at night when he and the men with him were transferred over to the No. 2 hatch; the top deck of the ship was known as the main deck, immediately below that was the shelter deck, beneath the shelter deck was the 'tween deck, and below that was the lower deck; they worked that night on the shelter deck at hatch No. 2; when they came there the hatch covers were in place on one half of the hatch and had been removed from the other half; on the closed half of the hatch there were piled up the hatch covers removed from the other half.

When the men went to work that night on the shelter deck there was cargo being loaded below in the 'tween deck; beneath the closed half of the No. 2 hatch the work was finished; but men were still working below on the other half. Around the shelter deck hatch opening was a coaming, consisting of a steel plate built on a slant as it extended out from the edge of the opening of the hatch to the level of the deck; the coaming was about six or seven inches high at the opening of the hatch and slanted down to nothing at the point where it joined the deck; the width of the coaming was anywheres from 24 to 30 inches.

Cargo (previously loaded) filled the wings on the shelter deck; there was "fencing" to hold the cargo in place, the fence consisting of stacks of lumber going up and down and across, which held the cargo from slipping with the movement of the vessel; when plaintiff came to work at hatch No. 2 that cargo was already loaded and the fencing was in place; the men at work on the shelter deck then had a space in which to work only about 30 inches in width between the cargo with its fence and the opening of the

hatch; and that space to work was upon the slant of the steel coaming.

On the shelter deck where plaintiff and his men were working they had no lights; there was only a light coming from near a ladder forward—the ladder from the main deck down to the shelter deck; on the 'tween deck below there were two flood lights which were pointed down and did not throw any light up on the shelter deck where the plaintiff and his men were working. Plaintiff was at work taking the hatch covers from off the hatch and putting them to one side; as he placed the hatch covers to one side plaintiff turned around to get some lash (rope) to lash them down; plaintiff was then at work off of the hatch covers and on the slant of the coaming; a' he knew was that he slipped and went down; he went down from the shelter deck to the 'tween deck; he slipped and fell in the opening—he fell down 10 to 15 feet.

Prior to the accident plaintiff was standing about three feet from the actual opening; as the men pushed the hatch covers out to him he grabbed his end so that the cover didn't go down; he turned and started to walk over to get a piece of lash—he started to walk about two feet, slipped and fell, and landed on some cargo in the 'tween deck; plaintiff said he turned around, started to walk forward and slipped, his foot going out in front of him, and he fell through the opening.

Petrucelli, plaintiff's co-worker, testified that he had handed the hatch covers to plaintiff; he saw the plaintiff's feet slide and the plaintiff fall from the shelter deck coaming down to the 'tween deck. Saxon, another member of the gang, saw plaintiff on the coaming; plaintiff's feet slipped out from under him and he fell to the 'tween deck; Saxon said, of the place where he saw the plaintiff fall, "it looked like there was some grease there"; shortly after plaintiff fell Saxon went over to that place and saw the grease spot—his best estimate of the size

of the patch of grease was about five or six inches. D'Amico, who was working on the opposite side of the hatch, saw plaintiff fall to the 'tween deck; he went over to where he saw the grease—it was just a patch or spot of grease. Both Saxon and D'Amico said there were no lights on the shelter deck where they were working—there was only a single light up forward near the ladder that led down from the main deck—where they were working the light was very dim.

Dr. Rini, who had treated plaintiff, testified to the seriousness of plaintiff's injuries and their permanent character. Defendant called no witness other than Dr. Auerbach, the physician who had examined plaintiff on defendant's behalf. At the conclusion of his testimony both sides rested.

No exceptions were taken to the Court's charge. The jury retired at 3:00 P. M.; at 4:20 P. M. the Court called the jury back into the courtroom and the following occurred:

"The Court: Madam foreman and members of the jury: I am going to order a sealed verdict, and a paper in the form of a ballot will be handed to you by the Clerk, and you will be given instructions as to it.

Just before that is done, however, I would like to know whether I could help you in any way.

Yes, madam?

A Juror: Your Honor, I would like to know if, for instance, if we are in favor of the defendant, and I am just giving you a for instance, can the plaintiff be awarde any amount?

The Court: If you find the defendant is not liable, then the plaintiff cannot be awarded any amount.

A Juror: Any amount, that is what I wanted to know.

A Juror: I should like to know if the plaintiff has any other avenue open to him if we disagree.

The Court: I am afraid that isn't a matter for consideration.

Generally speaking, of course you know there is in the State of New York a compensation statute between employers and employees.

Any other questions?

Then you may retire.

Mr. Gallagher: If your Honor pleases, on that question may I be heard for just a moment?

The Court: You may be heard at the Bench.

Ladies and gentlemen, you may retire.

(At this point the jury retired to the jury room.)

(The following occurred at the Bench):

Mr. Gallagher: Your Honor, this accident happened in 1953, and with reference to compensation, I feel the statute of limitations would bar us.

The Court: I am not going into that, I will not discuss that."

On May 2, 1956, the jury rendered a sealed verdict in favor of the defendant. Plaintiff's motion (made immediately thereafter) to set aside the verdict as contrary to the law and against the evidence, contrary to the weight of the evidence, and on all the other grounds that would set aside the verdict, was denied, with an exception. Plaintiff, at his counsel's request, was given ten days to prepare a further motion. Thereafter, and within the ten days, additional reasons having come to light for the setting aside of the verdict, plaintiff made a motion to reargue the prior motion and for an order setting aside the verdict, and awarding judgment in favor of plaintiff, or in the alternative granting a new trial, upon the further grounds that the verdict was rendered under a misconception of the law; that such verdict and judgment was a miscarriage of justice, and was rendered on mistaken ideas of the law; and on all the grounds set forth in

the rules and practice of the Court in such case made and provided. The new and additional facts upon which said motion was made are set forth in the moving affidavit of plaintiff's attorney upon said motion, of which the substance, so far as material, is set forth in the argument below. The said motion was denied without opinion, by order of the Trial Judge (Judge Galston) on June 18, 1956.

On May 25, 1956, plaintiff filed and served notice of appeal from the said verdict rendered and judgment entered thereon on or about May 2, 1956, in favor of the defendant and against the plaintiff. On July 3, 1956, plaintiff filed and served notice of appeal from said order of Judge Galston dated June 18, 1956. On July 11, 1956, judgment was entered in favor of the defendant. On July 26, 1956, plaintiff filed and served an amended notice of appeal, reciting the appeal from said judgment entered on July 11, 1956.

Thereafter, on October 1st, 1956, plaintiff applied to the Court of Appeals for an order directing and authorizing the Clerk of the United States District Court for the Eastern District of New York to furnish to plaintiff's attorney the names and addresses of the jurors who sat upon the said trial herein; and for permission to plaintiff's attorney to interview and question the said jurors, and put their statements in affidavit form, and for other relief. By this motion plaintiff endeavored to obtain relief as to which his efforts in the District Court had theretofore proved unavailing. Upon the return day of said motion the Court of Appeals denied the application with the suggestion and direction that a motion for similar relief be made in the District Court.

Accordingly, on October 24, 1956, plaintiff made a motion before Judge Galston for an order

(a) Directing and authorizing the Clerk of the Court to furnish plaintiff's attorney with the names and addresses of the members of the jury.

(b) Authorizing and permitting plaintiff's attorney to interview and question them as to the issues herein and to put their statements in affidavit form; and

(c) If difficulty be encountered in accomplishing the provisions set forth in "b" that subpoenae be issued directing said jurors to appear at a specified time in open court and testify as to the matters set forth in the moving affidavit, and give detailed information as to the same.

On November 9, 1956, Judge Galston made an order denying said motion. This motion was likewise denied without opinion. On November 26, 1956, plaintiff filed and served notice of appeal from the said order of Judge Galston dated November 9, 1956.

Plaintiff contended in the Court below that the verdict was contrary to the evidence; that it was unsupported by any evidence; that it was contrary to law in that the jurors ignored the Court's instructions and rendered a verdict contrary thereto and in violation thereof; and in so doing the jurors acted upon and were guided by a wholly mistaken conception of the applicable law, induced by extraneous circumstances and influences improperly brought to the attention of the jurors in the course of their deliberations.

The present application, however, has no concern with the weight or sufficiency of the evidence. The petitioner prays that a writ of certiorari issue for the review of the two questions of law presented herein, as set forth on pages 1-2 above.

Argument

(1)

(a) Affidavits of jurors are admissible, and the Trial Court may make inquiry, upon the question whether the verdict was influenced and brought about by outside matter not properly before the jury.

(a) In the present case (under the circumstances disclosed, as hereinafter set forth) the refusal of the Trial Judge to make, or to permit to be made, inquiry whether extraneous and prejudicial influences improperly entered into the deliberations and verdict of the jury constitutes reversible error.

"A reviewing court is always reluctant to disagree with the determination of the trial judge that the verdict of a jury was not influenced by outside matters, *yet the reviewing court has a duty to see that there is no miscarriage of justice.*" *Paramount Film Distributing Corp.* v. *Applebaum,* 5 Cir. 217 F. 2d 101, 106. (Emphasis supplied.)

In *Fort Worth & Denver Ry. Co.* v. *Thompson,* 5 Cir. 216 F. 2d 790, 792 (citing and quoting *City of Amarillo* v. *Emery,* 5 Cir., 69 F. 2d 626, 627) it was said:

> "While a juror may not testify to a matter resting in his personal consciousness, affidavits of jurors, which show overt acts constituting misconduct or that extraneous matters that might influence the jurors have been brought to their attention, are admissible."

A plain and succinct statement of the applicable legal principle was made by Chief Justice Fuller in *Mattox* v. *United States,* 146 U. S. 140, as follows:

> "But a juryman may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind."

Referring to its decision in the *Mattox* case and in *United States* v. *Reid*, 53 U. S. 261, this Court (in concluding its discussion of the subject in *McDonald* v. *Pless*, 238 U. S. 264, 267) said:

> "Both of these decisions recognize that it would not be safe to lay down any inflexible rule because there might be instances in which such testimony of the jurors could not be excluded without 'violating the plainest principles of justice'."

In *Stevenson* v. *Tennessee Copper Co.*, 193 F. 268, where it appeared by affidavit that certain of the jurors had expressed in the jury room their own opinion (which they purported to give as authentic) as to values and prices of timber of the kind there involved, Sanford, D. J., writing for the Circuit Court of Appeals, said:

> "I am therefore constrained to hold, in view of this opinion in the *Mattox* case, that the affidavit of a juryman is admissible as to any facts bearing upon the question of the *existence of any extraneous influence* brought to bear upon the jury in their deliberations, constituting misconduct, open to the knowledge of all the jury and not alone resting within the personal consciousness of one." (Emphasis supplied.)

To the same effect:

Texas & New Orleans R. R. Co. v. *Underhill*, 5 Cir., 234 F. 2d 620, 624;

Stiles v. *Lawrie*, 6 Cir., 211 F. 2d 188;

Southern Pacific Co. v. *Klinge*, 10 Cir., 65 F. 2d 85, 88.

Upon a motion made to set aside a verdict and for a new trial because of alleged extraneous influences brought to bear upon the jurors (as shown by affidavits) generally the trial court should *entertain the application*—the dis-

position thereof is lodged in the sound discretion of the court.

Where discretion is lodged it must be exercised—it was so stated by Taft, C.J. (later Chief Justice Taft) in *Felton* v. *Spiro*, 8 Cir., 78 F. 576, where the learned Judge further said:

> "In *Mattox* v. *United States*, 146 U. S. 149, it was held that, where the trial court excluded affidavits offered in support of a motion for a new trial, and in passing upon the motion *exercised no discretion* in respect of the matters stated in the affidavits, the question of the admissibility of the affidavits was preserved for the consideration of the supreme court on writ of error, notwithstanding the general rule that the allowance or refusal of a new trial rests in the sound discretion of the trial court." (Emphasis supplied.)

As a basis for the exercise of discretion the trial court should make, or cause to be made, such investigation as may (under the circumstances) be reasonably called for. Thus, in the case *of Poindexter* v. *Groves*, 2 Cir., 197 F. 2d 915, 919, where a juror wrote a letter to defendant's counsel that the verdict for plaintiff was not her verdict and that she had yielded under pressure in the jury room, the trial judge (whose attention had been called to the letter) caused her to appear before him and submit to most careful questioning—whereupon he decided that (under the circumstances disclosed) no proper case was presented for a new trial, *but the important thing is that an investigation was had*—which was flatly refused in the case at bar.

A recent case more nearly like the instant case in its relevant facts than any of those above cited is *State* v. *Kociolek*, 20 N. J. 92, where the applicable law is fully set forth in the opinion of Mr. Justice Brennan, then of the New Jersey Supreme Court and now of this Court. In

that case it appeared that upon a trial for first degree murder, the jury had reached a unanimous agreement upon defendant's guilt, but could not reach a decision "on the chair or life imprisonment." At that point there was injected into the discussion of the problem the assertion by several members of the jury that the defendant was the same man charged with atrocious assault and battery on one Glenn (not the deceased) one day before the date of the commission of the crime which was the subject of the present prosecution. Thereafter reference to the Glenn incident recurred repeatedly in the jury's deliberations. The jury arrived at the agreement not to recommend mercy only after some of the jurors recalled (and the entire jury then considered) another indictment against the defendant, not in evidence, to which the defendant, two weeks before, had pleaded not guilty in the same courtroom and *within the hearing of the panel* of which the jurors, or several of them, were members. In granting a new trial, Mr. Justice Brennan said:

> "The better reasoned decisions support the exclusion of the jurors' testimony as to their mental processes, not upon the discredited basis of the policies against self-stultification and evidence of jury-tampering, perjury or other fraudulent practices, but upon the sounder ground that, being personal to each juror, the working of the mind of any of them cannot be subjected to the test of other testimony, and therefore that such testimony should not be received to overthrow the verdict to which all assented (citing cases). Where, however, jurors' testimony goes not to the motives or processes by which they reached their verdict, *but merely to the existence of conditions or the occurrence of events bearing upon the verdict*, that basis of policy does not exist, and this whether the condition happens or the event occurs in or outside the jury room." (Emphasis supplied.)

And Mr. Justice Brennan added that with this limitation upon evidence of extraneous matters, "sound policy is satisfied and at the same time the evidence can serve to avert, as here, a grave miscarriage of justice which it is certainly the first duty of a court of conscience to prevent if at all possible."

(b) In the instant case the facts whereby it was disclosed that extraneous matters were improperly brought to the attention of the jurors in the jury room, appear in the several moving affidavits of the plaintiff's attorney, particularly in his affidavit upon the motion made in the District Court, returnable October 24, 1956, at the suggestion and direction of the Court of Appeals.

Plaintiff's attorney, who made the affidavit, had been a member of the Bar of the State of New York for more than 50 years, and a member of the Bar of this Court since November 12, 1937; and his veracity is not questioned.

The facts as they appear in the said moving affidavit upon said application in the District Court (stated as concisely as possible) include the following:

The sealed verdict directed herein, when opened on the following morning, was in favor of defendant.

Leaving the courtroom after the rendition of verdict, the deponent, the plaintiff's attorney, was explaining as best he could to his client, the plaintiff herein, what the verdict actually meant as rendered; and he told plaintiff he felt the verdict was a mis-carriage of justice and should have been in favor of the plaintiff instead of the defendant. Several of the jurors then in the corridor, of their own accord, joined in the conversation and volunteered the information that the party sued, the defendant Steamship Company, had been an improper party because the said jurors knew (as they thought) that the ship was not responsible and that his employer should have given him a safe place to work.

At that time the deponent did not know the names of these jurors and could not identify them by name, but he emphatically stated, that he did identify them as members of the jury who tried this case and rendered the verdict above referred to.

One of the jurors then commiserating with the plaintiff and deponent about the outcome was the forewoman; she complimented deponent on the way he had handled the preparation and trial, but said "You made a mistake—you sued the wrong party—you should have sued his employer."

While this discussion was going on about five of the jurors who had been on the jury joined in and another woman juror stated "Yes, that's right, you should have sued the employer." All of the jurors present appeared in accord with these statements then being made by those in the discussion, and the forewoman above mentioned stated "You should have sued Jarka, the employer, for you know the law says that the 'employer must provide a safe place for the employee to work.' You sued the ship and that was wrong."

Deponent, in attempting to learn the true state of facts, mentioned that the jurors were actually the ones who were mistaken and confused in the law; and that the Judge did explain the law properly but they interpreted it incorrectly.

In the general conversation that ensued, these jurors said they could not be mistaken as to the law *because Judge Galston had definitely stated it to them in another case on which several of them had sat.* It then developed that several of the jurors had been members of the jury in the case of *Wells* v. *New York Central Railroad*, which was tried in the same courtroom and before the same Judge immediately before the trial herein. That was an action brought by a railroad employee under the Federal

Employers Liability Act. It is of course, well known that under the Federal Employers Liability Act the "employer must provide a safe place for the employee to work."

The deponent believed (and so stated) that the instant case was taken into the jury room and thrashed out by several jurors, who evidently prevailed, on the theory and under instructions as given them *in the railroad case* that had been tried immediately prior; and that these jurors were able to convince the rest of them that the law was the same in this case, and that the present action should have been brought against the employer as prescribed in the Federal Employers Liability Act.

Permission was thereupon asked, on said motion, to obtain the names and addresses of the jurors who rendered the verdict for the defendant in this case, and to interview them for the purpose of obtaining affidavits as to the above; if this were not accomplished under such an order, then the deponent further requested an order to provide that subpoenae issue, directing them to testify in court with reference to the facts above set forth.

It was further said by the deponent that, in his opinion (and it was respectfully submitted) there was a miscarriage of justice here; regardless of the extent of the injuries sustained by plaintiff, negligence on the part of the ship was definitely established, and in fact not controverted; and the verdict should have been in favor of the plaintiff and against this defendant.

It is further respectfully submitted the facts as hereinbefore narrated called for and required further investigation—such as was had by the trial court in the case of *Poindexter* v. *Groves*, 2 Cir., 197 F. 2d 915, 919, above referred to on page 11 hereof.

To leave the case without the further investigation called for herein, would only mean that although the sole evi-

dence on the issue of liability (not controverted by defendant) was in favor of plaintiff, yet the defendant had a verdict.

The result was plainly due to the erroneous conception of the law improperly introduced by some of the jurors into their deliberations; affidavits of jurors to that effect are admissible under the foregoing authorities; and plaintiff's efforts to procure such affidavits or otherwise to obtain the desired and necessary information under the Court's direction and supervision, should have been heeded and given effect in the Courts below.

Reference may properly be made herein to the case of *Southern Pacific Company* v. *Klinge*, 10 Cir., 65 F. 2d 85, 88. In that case, while the jury was deliberating, one juror said to the others that he had been told defendant had offered $20,000 in settlement of the case; and after an overnight adjournment that he had investigated and found it to be the fact. There was a verdict for plaintiff in the sum of $27,000. In reversing the judgment and granting a new trial, the Court said:

> "It need hardly be said that nothing could be more prejudicial to a defendant's rights. It would be an unusual juror who would have the courage to return a verdict for less than the defendant had offered, where liability was conceded. * * *
> If the jury system is to last, it is important that verdicts should not be set aside for trifling reasons; *of still greater importance is it that a jury's verdict, although misguided should be a verdict 'on the law and the evidence'.*" (Emphasis supplied.)

The instant case is one where the verdict clearly was not "on the law and the evidence."

It is said in the opinion of the Court below that the plaintiff-appellant was under a misconception of the law—rather, it is respectfully submitted, it was the Court below

acted under misconception of this important phase of the law.

The Court said in its opinion that verdicts have been set aside "because evidence was brought before the jury outside court"—apparently the Court was of the impression that the right to have the verdict set aside is limited to cases where there has been some *objective material* (such as the newspaper in the *Mattox* case) brought into the jury room; but there is no such hard and fast limitation.

This Court (in *McDonald* v. *Pless*, 238 U. S. 264, 267, *supra*) cautioned against laying down "any inflexible rule, because there might be instances in which such testimony of the juror could not be excluded without 'violating the plainest principles of justice'." Where one or more of the jurors make to the others in the jury room irrelevant and misleading statements about matters alleged to have been heard or observed *outside the court* or outside the case on trial (as in *Stiles* v. *Laycie*, *supra*, and in *State* v. *Kociolek*, *supra*); and based thereon an improper and erroneous verdict is rendered, the verdict, upon the facts being disclosed should be set aside. Any other ruling results (as in the present case of the seriously injured longshoreman) in a gross miscarriage of justice—to correct which this review upon certiorari is sought.

(2)

The determination of the Court below that the reference to the Workmen's Compensation Law of the State of New York, volunteered upon the trial by the District Judge, did not constitute reversible error, is contrary to law, as recognized and enforced both in the courts of the United States and in the courts of the State of New York.

In the colloquy between the Court and the jury (set forth in full on pages 5-6 above) a juror had asked "if, for instance, if we are in favor of the defendant, and I am just

giving you a for instance, can the plaintiff be awarded any amount?" The Court's answer was, of course, in the negative; but it is difficult to see how a juror of ordinary intelligence could ask such a question, unless it was because the jurors, relying upon the mistaken statements with respect to the law made by some of the members, had concluded after discussion that plaintiff had sued the wrong party and that they could, therefore, give him nothing, *but nevertheless they would have liked to give him something.*

More important was the question of another juror who said "I should like to know if the plaintiff has any other avenue open to him if we disagree"; and the Court's answer; "I am afraid that isn't a matter for consideration. Generally speaking, of course, you know that there is in the State of New York a compensation statute between employers and employees." Plaintiff's counsel's effort to be heard upon an objection met with an abrupt termination.

No exception was noted; but under Rule 46 of the Federal Rules of Procedure, an exception was unnecessary. Apart from the Rule, however, the error was so far fundamental that it was within the province of the reviewing court in any event to take notice thereof, to prevent a miscarriage of justice.

Interjection into the case of the New York State Workmen's Compensation Law was a two-fold error.

(1) In the first place, in this matter of maritime or admiralty jurisdiction the State Compensation Act had, of course, no application.

The matter of workmen's compensation having been mentioned, the Court should have withdrawn its statement, and stated to the jury that the Workmen's Compensation Board of the State of New York had no jurisdiction and could not afford plaintiff any relief—this the Court did not do.

As it was, the jury were left with the erroneous impression that if they were to give plaintiff nothing (as they felt they would have to after their mistaken discussion and conception of the applicable law) nevertheless, the plaintiff would recover something by way of the New York State Compensation Act—he would not be left wholly uncompensated—a fact which may well have operated to overcome the reluctance of at least some of the jurors about joining in a verdict for defendant, and turning the plaintiff away with nothing.

(2) In any event any mention of Workmen's Compensation was completely out of place herein and constituted reversible error."

In *Zimber* v. *Kress*, 225 App. Div. 16, 18 (where reference to Workmen's Compensation had developed upon the trial) the Court said (in reversing a judgment because of that error):

> "It was no subject for the consideration of the jury that the plaintiff might, if he failed in the present action, secure certain compensation from his employer or the insurance carrier."

In that case it was further said "*We deem this extraneous matter highly prejudicial*"; and that the introduction of such matter constituted reversible error.

To the same effect:

> *Regan* v. *Frontier Elevator & Mill Co.*, 211 App. Div. 164, 166;
> *Luther* v. *Jacobs*, 282 App. Div. 809, 810.

In *Altenbaumer* v. *Lion Oil Co.*, 5 Cir. 186 F. 2d 35 (cert. denied, 341 U. S. 914), a judgment was reversed because the District Court did not exclude from the jury the fact that the deceased workman was covered by workmen's

compensation; in the opinion of the Court on appeal, it was said:

> "In the first place it was completely immaterial to any legitimate issue; in the second place it was highly prejudicial in itself and made more so by the way it was brought out and kept before the jury."

In *Plough* v. *Baltimore & Ohio R.R. Co.*, 2 Cir., 164 F. 2d 254 (cert. denied, 333 U. S. 861), where defendant had been permitted to show upon the trial that the plaintiff had been awarded compensation under the New York Workmen's Compensation Law, and that the amount awarded had been paid by the employer, a judgment for defendant was reversed by the Circuit Court of Appeals, Second Circuit, Chase, C.J., writing:

> "It is well established that such evidence would not have been admissible had the suit not been tried in the courts of New York [citing *Regan* v. *Frontier Elevator & Mill Co.*, *supra*, and *Zimber* v. *Kress*, *supra*, and other cases]. Thus reversal is required provided the admissibility of such evidence in a federal court is governed by state law, * * *. We have no occasion to discuss that question on this appeal, however, since we conclude that the state and federal rules as to the admissibility of the particular kind of evidence both require its exclusion."

In *Regan* v. *Frontier Elevator & Mill Co.*, 211 App. Div. 164, 166, referring to defendant's insistence upon the trial on plaintiff's right under the Workmen's Compensation Law of the State of New York, the Court said (in language particularly applicable to the instant case), that such insistence case) that such instance

> "might well influence the jury toward the erroneous view that the plaintiff's loss should find compensation in part at least from his employer under the provisions of that statute."

The unhappy remark of the Trial Judge, with respect to the New York Workmen's Compensation Law, came at the very end of the case—in fact, it was his *last word* to the jury. It was not withdrawn; and there was no direction or instruction to the jury to disregard it. It afforded assurance to the jurors, or some of them, that if they brought in a verdict for defendant (which they were reluctant to do) nevertheless, there would be other compensation available to the plaintiff. In that situation the error went to the very substance of the verdict—reversal did not require the Court below (in the language of the opinion) to "clutch at gossamers".

Reasons for Granting the Writ

Rule 38(5) of the Rules of this Court provides that among the reasons which may be considered for granting a review on a writ of certiorari are the following: where the Court of Appeals has decided an important state question in conflict with applicable state law; where the Court of Appeals has decided an important question of federal law which has not been, but should be settled by the Supreme Court; where the Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court; or where the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned such a departure by a lower court, as to call for this Court's power of supervision. It is respectfully submitted that all of these reasons are present, in substance, in greater or less degree, upon the present application.

CONCLUSION

Petitioner respectfully submits that this petition for a writ of certiorari to the Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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